Lina Soo v Ngu Chu Hiong & Anor (No 2)

HIGH COURT (KUCHING) — DIVORCE PETITION NO KG9 OF 1991
LAU BEE LAN JC
14 OCTOBER 2003

Civil Procedure — Action — Cause of action — Divorce petition — Claim for damages on ground of adultery — Death of co-respondent — Whether cause of action survived death thereof — Civil Law Act 1956 s 8(1), (3); Rules of the High Court 1980 O 15 r 6(2)

Civil Procedure — Parties — Striking out of — Divorce petition — Claim for damages on ground of adultery — Death of co-respondent — Striking out of co-respondent as party to action — Whether proper — Rules of the High Court 1980 O 15 r 6(2); Civil Law Act 1956 s 8(1), (3)

This was an appeal against the decision of the learned deputy registrar allowing the application of the administratrix of the co-respondent to strike out the name of the co-respondent from the divorce petition as the petitioner's cause of action which was a claim for damages against the co-respondent on the ground of adultery, did not survive the death of the co-respondent by virtue of s 8(1) of the Civil Law Act 1956 ('the Act'). Counsel for the petitioner contended that s 8(1) of the Act did not apply as the petitioner's cause of action survived the death of the co-respondent and that adultery was admitted by the co-respondent. The issues to be determined by the court were: (i) whether the petitioner's cause of action based on s 8(1) of the Act survived the death of the co-respondent; and (ii) if not, whether the court could then strike out the name of the co-respondent as a party to the petition pursuant to O 15 r 6(2)(a) of the Rules of the High Court 1980 ('the RHC').

Held, dismissing the appeal with costs:

(1) Section 8(3) of the Act has to be read with s 8(1) thereof. The phrase 'which by virtue of this section has survived against the estate of a deceased person' is significant. This phrase qualifies the phrase 'in respect of a cause of action in tort' which precedes it and these two phrases together further qualify the phrase which precedes both these phrases, namely 'No proceedings shall be maintainable'. Reading the proviso to s 8(1) of the Act together with the phrase 'in respect of a cause of action in tort which by virtue of this section [in particular, with reference to s 8(1)] has survived against the estate of a deceased person' in s 8(3), it is crystal clear that a cause of action to a claim for damages on the ground of adultery is outside the purview of s 8(3) of the Act because such a cause of action in the first instance does not survive on the death of any person. Therefore, s 8(3) of the Act did not apply to the instant case (see para 10).

(2) The submission of the learned petitioner's counsel that the co-respondent had admitted the adultery was misconceived. The purported admission of adultery of the co-respondent alleged by the learned counsel for the petitioner was also rendered a fallacy when examined in the light of the letter from the respondent's advocates. From the contents of the

letter, it was apparent that it was the respondent who categorically admitted his adulterous relationship with the co-respondent and even then, his relationship with the co-respondent started after the breakdown of the marriage (see para 11).

(3) The petitioner's cause of action did not survive the death of the co-respondent pursuant to s 8(1) of the Act. Therefore, court may in the exercise of its discretion strike out the name of Irene Chong Oi Khium as the co-respondent in the petition pursuant to O 15 r 6(2) of the RHC (see para 14).

[**Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan timbalan pendaftar yang bijaksana yang membenarkan permohonan pentadbir responden bersama untuk membatalkan nama responden bersama dari petisyen perceraian kerana kausa tindakan pempetisyen iaitu tuntutan untuk ganti rugi terhadap responden bersama atas alasan hubungan luar nikah, tidak akan kekal selepas kematian responden bersama menurut s 8(1) Akta Undang-Undang Sivil 1956 ('Akta tersebut'). Peguam bagi pihak pempetisyen berhujah bahawa s 8(1) Akta tersebut tidak terpakai kerana kausa tindakan pempetisyen masih kekal selepas kematian responden bersama dan bahawa hubungan luar nikah telah diakui oleh responden bersama. Persoalan-persoalan yang perlu ditentukan oleh mahkamah: (i) sama ada kausa tindakan pempetisyen berdasarkan s 8(1) Akta tersebut masih kekal selepas kematian responden bersama; dan (ii) jika tidak, sama ada mahkamah kemudian boleh membatalkan nama respodnen bersama sebagai pihak kepada petisyen menurut A 15 k 6(2)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 8(3) Akta tersebut hendaklah dibaca dengan s 8(1). Ungkapan 'which by virtue of this section has survived against the estate of a deceased person' adalah penting. Ungkapan ini melayakkan ungkapan 'in respect of a cause of action in tort' yang mendahuluinya dan kedua-dua ungkapan bersama mendahului kedua-dua ungkapan tersebut, iaitu 'No proceedings shall be maintainable'. Membaca proviso kepada s 8(1) Akta tersebut bersama ungkapan 'in respect of a cause of action in tort which by virtue of this section [in particular, with reference to s 8(1)] has survived against the estate of a deceased person' dalam s8(3), ia amat jelas bahawa satu kausa tindakan terhadap satu tuntutan ganti rugi atas alasan hubungan luar nikah adalah di luar lingkungan s 8(3) Akta tersebut kerana kausa tindakan sedemikian pada mulanya tidak boleh kekal selepas kematian sesiapa. Oleh itu, s 8(3) Akta tersebut tidak terpakai dalam kes semasa (lihat perenggan 10).

(2) Hujah peguam pempetisyen yang bijaksana bahawa responden bersama telah mengakui hubungan luar nikah telah disalah tanggap. Pengakuan yang dikatakan berhubung hubungan luar nikah responden bersama yang dikatakan oleh peguam bijaksana bagi pihak pempetisyen juga

dianggap palsu apabila diperiksa berdasarkan surat daripada peguambela responden. Berdasarkan kandungan surat tersebut, ia adalah nyata bahawa responden telah dikategorikan sebagai telah mengakui terhadap hubungan luar nikah beliau dengan responden bersama dan meskipun demikian, hubungan beliau dengan responden bersama hanya bermula selepas keruntuhan perkahwinan tersebut (lihat perenggan 11).

(3) Kausa tindakan pempetisyen tidak boleh kekal selepas kematian responden bersama menurut s 8(1) Akta tersebut. Oleh itu, makhamah boleh dalam budi bicaranya membatalkan nama Irene Chong Oi Khium sebagai responden bersama dalam petisyen tersebut menurut A 15 k 6(2) KMT (lihat perenggan 14).]

Notes

For cases on cause of action, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 56–66.

For cases on striking out of parties, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4345–4346.

Cases referred to

Lina Soo v Ngu Chu Hiong & Anor [2003] 6 MLJ 641 (refd)

Legislation referred to

Civil Law Act 1956 s 8(1), (3)
Rules of the High Court 1980 O 15 rr 6(2)(a), 7, O 56 r 1, O 92 r 4

Ernest Chua (Ernest Chua & Co) for the petitioner.
Jammie Tai (Tang & Partners) for the co-respondent.

Lau Bee Lan JC:

[1] The petitioner has appealed against the decision of the learned deputy registrar dated 22 July 2002 in allowing the application of the administratix of the co-respondent to strike out the name of Irene Chong Oi Khium as the co-respondent in the petition of Lina Soo dated 25 January 1991 ('the petition') pursuant to O 56 r 1 of the Rules of the High Court 1980 ('the RHC') (encl 224).

[2] By way of background, the co-respondent had passed away on 19December 2000 and letters of administration was issued to her mother, Madam Liaw Ah Kee. Madam Liaw Ah Kee as the administratix of the estate of the co-respondent on 3 September 2001 vide a summons in chambers dated 3 September 2001 (encl 200) applied for an order that the petition be amended by striking out the name of the co-respondent and that there be no order as to costs ('the application'). As mentioned earlier, the learned deputy registrar had ruled in favour of the administratix of the estate of the co-respondent, to wit, the petitioner has appealed which is now before the court.

[3] The application is supported by two affidavits affirmed on 28 August 2001 and 13 December 2001 respectively ('Liaw's affidavits I and II') (encll 200 and 206). The application is opposed by the petitioner through the two affidavits of Lina Soo affirmed on 29 November 2001 and 21 December 2001 respectively ('petitioner's affidavits I and II') (encll 203 and 209).

[4] The main ground in support of the application is that the petitioner's cause of action which is a claim for damages against the co-respondent on the ground of adultery does not survive the death of the co-respondent by virtue of s 8(1) of the Civil Law Act 1956 ('the Act'). The petitioner opposed the application premised essentially on the grounds that the adultery was admitted by the respondent and the proceedings has been stayed. With respect to the latter ground, the petitioner had argued by way of a preliminary point seeking the court's determination whether the application was a proceeding for all intents and purposes as there was a court order for stay of proceedings in the action. The court dismissed the preliminary point (see *Lina Soo v Ngu Chu Hiong & Anor* [2003] 6 MLJ 641).

[5] The main thrust of the application hinges on s 8(1) of the Act. Section 8(1) reads:

> Effect of death on certain causes of action
>
> 8(1) Subject to this section, *on death of any person all causes of action subsisting against* or vested in *him shall survive against, or,* as the case may be, *for the benefit of, his estate*:
>
> *Provided that this subsection shall not apply* to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or *to any claim for damages on the ground of adultery*. (Emphasis added.)

[6] It is the contention of the learned counsel for the co-respondent, Miss Jammie Tai that based on this section alone, the petitioner's cause of action does not survive the death of the co-respondent and pursuant to O15 r 6(2)(a) of the RHC, the court can strike out the name of the co-respondent as a party to the petition. Otherwise, it was also submitted that the court could invoke its inherent powers under O 92 r 4 of the RHC to order striking out.

[7] On the other hand, learned counsel for the petitioner, Mr Ernest Chua argued that the petitioner's cause of action survived the death of the co-respondent; hence the non-applicability of s 8(1) of the Act for the following reasons:

(1) the co-respondent at the hearing of the petition admitted the adultery;

(2) as the co-respondent was named by the petitioner for the purpose of condemnation of damages which was already admitted by the co-respondent, the cause of action for condemnation of damages against the co-respondent and subsequently against the estate of the co-respondent ought to survive the death of the co-respondent.

[8] In relation to s 8(1) of the Act, a plain reading of the provision clearly shows that in the context of the present case:

(1) on the death of any person (which includes the co-respondent);

(2) all causes of action subsisting against that person (which includes the action against the co-respondent); and

(3) except a cause of action to any claim for damages on the ground of adultery, which is the case here, shall survive for the benefit of the estate of the deceased person.

[9] Learned counsel for the petitioner seeks to rely on s 8(3) of the Act contending that the catch words are 'were pending at the date of his death' and s 8(1) would come into play only when we start a new cause of action and not during a pending action as is the situation in the instant case.

[10] With due respect to the learned counsel, I cannot agree with this line of argument. I am of the view that s 8(3) of the Act has to be read together with s 8(1) of the Act. The phrase 'which by virtue of this section has survived against the estate of a deceased person' is significant. To my mind, this phrase qualifies the phrase 'in respect of a cause of action in tort' which precedes it and these two phrases together further qualify the phrase which precedes both these phrases, 'No proceedings shall be maintainable'. Reading the proviso to s 8(1) of the Act together with the phrase 'in respect of a cause of action in tort which by virtue of this section [in particular, with reference to s 8(1)] has survived against the estate of a deceased person' in s 8(3), it is crystal clear that a cause of action to a claim for damages on the ground of adultery is outside the purview of sub-s 3 of s 8 of the Act because such a cause of action in the first instance does not survive on the death of any person. Therefore, s 8(3) of the Act, in my opinion, does not apply to the instant case at all.

[11] Further, I find that the submission of the learned petitioner's counsel that the co-respondent has admitted the adultery is misconceived. I agree with the submission of the counsel for the co-respondent in this regard. It is certainly not true in the light of the averment where the co-respondent in para 2 of the answer to the petition stated that 'She has not committed adultery as alleged by the petitioner in para 10 of the petition or at all'. The purported admission of adultery of the co-respondent alleged by the learned counsel for the petitioner is also rendered a fallacy when examined in the light of the letter from M/sChong Brothers (advocates for the respondent) dated 26September 1998 which counsel himself seeks to rely on. From the contents of the letter, it is indeed apparent that it was the respondent who categorically admitted his adulterous relationship with the co-respondent and even then, his relationship with the co-respondent started after the breakdown of the marriage.

[12] In relation to the point submitted by the learned counsel that the cause of action against the co-respondent is an action in personam which is conceded by the learned petitioner's counsel, I am of the view that whether the action is an action in personam or not is immaterial in determining the application. The reason is because given that the cause of action survives the death of a person who is named as a party to the action, the other party can always apply for substitution of parties under O 15 r 7 of the RHC. Therefore, that which is of material importance is whether the cause of action survives the death of the person under s 8(1) of the Act.

[13] As has been submitted by the learned counsel for the co-respondent, O 15 r 6(2)(a) of the RHC, inter alia, provides that the court at any stage of the proceedings in any cause or matter may on such terms as it think just, on an application, order any person, who has for any reason ceased to be a proper or necessary party, to cease to be a party.

[14] In conclusion, for the reasons highlighted, I find that the petitioner's cause of action does not survive the death of the co-respondent pursuant to s 8(1) of the Act. Following that, I also find, the court may in the exercise of its discretion strike out the name of Irene Chong Oi Khium as the co-respondent in the petition pursuant to O 15 r 6(2)(a) of the RHC. Under the circumstances, the decision of the learned deputy registrar in respect of the application of the co-respondent is affirmed and the appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari